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IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1971

## REARGUMENT OCTOBER TERM, 1972

## NO. 70-40

MARY DOE; Peter G. Bourne; Robert Hatcher; Lillas L. James; James Waters; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Susanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver; residents of the State of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

*Appellants,*

VS.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; Lewis R. Slaton, as District Attorney of Fulton County, Georgia; and Herbert T. Jenkins, as Chief of Police of the City of Atlanta,

*Appellees.*

## On Appeal from the United States District Court For the Northern District of Georgia

# SUPPLEMENTAL BRIEF OF THE APPELLANTS

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## STATEMENT OF THE CASE

The district court, in its decision reported as *Mary Doe, et al,* v. *Arthur K. Bolton, et al,* 319 F.Supp. 1048 (N.D. Ga. 1970), supplemental opinion, 319 F.Supp. 1057 (N.D. Ga. 1970), found the Georgia abortion statute infringed a woman's constitutional right of privacy to decide if and when she would bear a child. A declaratory judgment was issued in which the court ruled that the right of privacy included the right to terminate an unwanted pregnancy. The court did not invalidate the procedures for

obtaining an abortion and refused to issue an injunction in support of its declaratory judgment. Appellants brought the case here under 28 U.S.C. §1253.

Oral argument was made before this Court on December 13, 1971, and an order for reargument was issued on June 26, 1972.

Appellants reassert each and every argument made in its brief previously filed; this brief is intended only to supplement the prior authorities cited.

## SUPPLEMENTAL ARGUMENT

### I. THE CONSTITUTIONAL RIGHT OF PRIVACY INCLUDES THE RIGHT TO TERMINATE AN UNWANTED PREGNANCY.

Appellants have previously urged the correctness of the district court's ruling in this case, *i.e.*, the right of privacy includes the right to terminate an unwanted pregnancy. This Court seems to have adopted that view last term in *Eisenstadt* v. *Baird*, ____U.S.____, 92 S.Ct. 1029 (1972). The Court, through Mr. Justice Brennan, said:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley* v. *Georgia*, 394 U.S. 557(1969). See also *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Jacobson* v. *Massachusetts*, 197 U.S. 11,29 (1905). [Emphasis in original.]

Appellants urge that the holding of the *Baird* case be expressly stated to encompass the right to terminate a pregnancy. Since submission of the prior briefs and oral argument in this case several courts, both federal and state, have ruled abortion statutes unconstitutional on the privacy ground. Appellants will not attempt to list or discuss these cases but refer the Court to the *amicus curiae* brief filed contemporaneously by Planned Parenthood Federation of America, Inc., and the American Association of Planned Parenthood Physicians. That brief surveys the recent cases and their holdings.

## II. THE PROCEDURAL REQUIREMENTS OF THE GEORGIA ABORTION STATUTE UNNECESSARILY BURDEN AND RESTRICT A WOMAN'S CONSTITUTIONAL RIGHT OF PRIVACY.

Appellants have asserted that the right of privacy involved is a constitutionally protected fundamental right and that a state's restriction thereof must be demonstrated to be "necessary to promote a compelling governmental interest." *Dunn v. Blumstein*, ____U.S.____, 92 S.Ct. 995 (1972). In commenting on the above test the Court stated:

> The key words emphasize a matter of degree: that a heavy burden of justification is on the state, and that statute will be closely scrutinized in light of its asserted purposes.

In discussing the durational residence requirements in that case, the Court stated further:

> It is not sufficient for the State to show that durational residence requirements further a very sub-

> stantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," . . . and must be "tailored" to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." [Citations omitted.]

Appellant's prior brief was directed at showing that the procedural requirements left standing by the district court (two consultants, approval by an abortion committee, and required accredited hospital facility) unnecessarily burden and restrict the constitutionally protected right. It is recognized that protecting the health of its citizens is a valid state interest, however, appellants contend there are other reasonable ways to achieve this goal with a lesser burden on the constitutionally protected activity. The procedure upheld by the district court is wholly lacking in adequate safeguards required by minimal due process requirements. The statutory hospital abortion committee is the decision maker as to whether a woman will receive an abortion, yet the woman has no right to make any presentation to the committee, to know the reasons on which the committee's decision is based, or to appeal an adverse decision. The procedure lacks fundamental fairness as to all applicants. The time consuming and cumbersome procedures of the statute and its requirement that abortions be performed only in accredited hospitals effectively manipulate plaintiff's rights out of existence.

Two recent cases deal specifically with similar A.L.I. abortion procedural requirements and the Court's attention is drawn to those analyses of similar statutory provisions.

The statute under attack in *Vuitch* v. *Hardy*, ____F. Supp. ____ (No. 71-1129-Y) (D.Md. June 22, 1972), like the Georgia statute, was modeled after the American Law Institute Model Penal Code. It required that abortions be performed in licensed, accredited hospitals (Joint Commission for the Accreditation of Hospitals) and the abortion must be approved by a "hospital abortion review authority appointed by the hospital."

The case was decided by a single district judge on a petition for writ of habeas corpus. The defendant had been convicted in a state criminal proceeding for performing a nonaccredited hospital abortion.[1] The position in the district court there was that hospitalization is generally not necessary for performance of abortions in the first trimester of pregnancy, that state-regulated clinics have been found to be safe and easily regulated in other states and that many Maryland women have been induced to seek abortions in other states because of costs and scheduling delays caused by the accredited hospital requirement.[2]

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[1]This decision does not rule on the hospital abortion committee requirement.

[2]It is interesting to note that only two hospitals in Maryland which provide obstetrical and gynecological services were not accredited, while in Georgia approximately 140 hospitals furnishing similar services are not accredited but are licensed. In 1971 Georgia women received 1,579 abortions in Georgia hospitals. For the same year 3,410 Georgia women travelled to New York for abortion services. See C. Tyler, L. Baker, J. Bourne, G. Burger, *Center for Disease Control Abortion Surveillance Report for 1971* (U.S. Department of Health, Education and Welfare, Public Health Service).

It was observed that abortion is a surgical procedure which affects the patient's health, however, the court found that "reasonable alternatives have been shown to exist which would entail less of a burden on the exercise of constitutional rights."

The Court found as a fact that

> . . . the requirement that abortion be performed only in licensed, accredited hospitals does place some burden on Maryland women's rights to seek an abortion, that that burden would be lightened by permitting abortions to be performed in other facilities as well,[3] and that the experience of other states has proved that, with appropriate regulation, facilities other than hospitals can and do protect the health of the woman seeking an abortion as adequately as hospitals do.[4]

The three-judge district court in *Poe* v. *Menghini*, 339 F.Supp. 986(D.Kan. 1972) also invalidated a JCAH accreditation requirement in the Kansas statute (also patterned after the A.L.I. model penal code). There 80 of 169 Kansas hospitals were not accredited, the court stated:

> So substantial a limitation of facilities constitutes a significant encroachment upon the exercise of a fundamental right.

---

[3]Several alternatives were discussed by the court, *e.g.*, use of specialized abortion facilities subject to state licensing and regulatory procedures. It was correctly observed, appellants think, that such facilities might be more susceptible to regulation than hospitals since the regulatory authorities might be hesitant to revoke a hospital's license especially where it was the only health care facility for an area.

[4]See brief of Planned Parenthood filed contemporaneously herewith for discussion of the New York clinical experience.

In discussing whether the state's interest was served by the JCAH requirement, the court made several pertinent observations: First, JCAH has never been concerned with the content of medical practice, rather, its standards are addressed to the physical plant, the organization of the hospital, equipment, etc. Thus, JCAH may help insure adequate personnel and facilities, but it has no bearing on the hospital's abortion policy or the decision making process. Second, the provision classifies abortion services apart from other medical procedures. Because the state interest could be fully protected by a less restrictive requirement, the Court found the accreditation requirement unconstitutional.

An additional infirmity in the accreditation requirement was found by the Kansas court because there the State of Kansas like the State of Georgia[5] purported to delegate authority to adopt standards for abortion services to the Joint Commission. This delegation was found to violate the due process clause of the Fourteenth Amendment.

Appellants here urge this Court to rule that the Georgia hospital accreditation requirement, like that of Maryland and Kansas, places an unnecessary burden and restriction on the exercise of fundamental constitutional right. Since there are reasonable, less restrictive alternatives sufficient to protect the state's interest, the state has not met its "heavy burden of justification" and the accreditation requirement must be invalidated.

The Kansas statute did not have an abortion committee provision, however, the Court did invalidate the requirement that three physicians certify the necessity of an abor-

[5]For argument on this point see Appellant's Brief, p. 12.

tion. Since the certifications were merely by other physicians (possibly a dermatologist or a podiatrist) rather than being limited to a specialty, *e.g.*, psychiatrists when mental health reasons were given, such (certifications) served no health interest. The Court apparently felt that the state's interest was served by preserving the traditional patient-physician relationship and placed reliance on the self-discipline and professional ethics of the medical profession.

With respect to the physician's right to practice their profession and exercise their professional discretion, the Court ruled that the required consultants provision subordinated the woman's attending physician's judgment to that of the other two physicians. Such a requirement unconstitutionally curtailed the availability of abortions and "the physician's right to administer to his patient in accordance with his best judgment." This reasoning is applicable to the Georgia consultants requirement and, of course, when applied to the hospital abortion committee requirement requires a similar result.

## CONCLUSION

The judgment of the district court should be reversed insofar as it found no justiciable controversy in the claim of appellant physicians, nurses, social workers, ministers, and family planning and abortion counselling organizations, and the opinion of this Court should expressly declare invalid the Georgia abortion statute and direct the district court to enjoin the future enforcement thereof with respect to abortions performed by physicians duly licensed to practice medicine by Georgia law.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Margie Pitts Hames, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, and on behalf of all Appellants, I served the foregoing Supplemental Brief of Appellants on the Appellees by depositing copies of the same in a United States mail box, with first class postage prepaid addressed to counsel of record at their post office addresses:

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This _____ day of September, 1972.

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